than other commodities.[10] For, in a system of barter, even if, as above, one wants to trade carrots for beef, one has improved his trading position relative to beef acquisition simply by trading carrots for anything more "tradable" than carrots. By doing so, the carrot holder has increased, by some margin, the number of beef sellers with whom he can now "barter." This being the case, only highly-desired commodities can emerge in an economy as money.

Absent some act of force compelling the use of a non-valued commodity, only commodity money can circulate as a medium of exchange.[11] As for the United States, this initiation of force in the monetary sphere happened most recently in 1933 when President Franklin D. Roosevelt, under threat of a $10,000 fine and a 10-year prison sentence, or both, compelled holders of commodity money to surrender it to banks and accept in "exchange" Federal Reserve notes. Executive Order 6102, April 5, 1933.[12] Of course, this action arguably constituted a taking of enormous magnitude. For example, contracts were often negotiated in terms of a commodity such as gold because of its intrinsic value as money and its stability of purchasing power, which contracts were nullified by this Court in the

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[10] Hans Hermann Hoppe, *Banking, Nation States, and International Politics: A Sociological Reconstruction of the Present Economic Order*, 4 Review of Austrian Economics 55 (1990).

[11] "States have never established fiat monies through 'social compacts,' but rather have had to create them at first by taking convertible commodity-based monies that were already in circulation and depriving them of their essential characteristic of permanent convertibility." George H. Selgin and Lawrence H. White, *In Defense of Fiduciary Media*, 9 Review of Austrian Economics 84 (1996). *See also* fn. 9, *supra*.

[12] http://www.presidency.ucsb.edu/ws/index.php?pid=14611&st=&st1= (last visited May 10, 2006).

name of "public policy." *See, e.g., Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U.S. 324 (1937); *Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935).

The commodities that emerge as money in market-based economies are not, however, totally random. Rather, they have traits that are quite predictable, including portability (high value per unit of weight), recognizability, divisibility, durability, and scarcity.[13] Absent such traits, some other commodity will be chosen as the medium of exchange. "Throughout all these eras and societies, however, two commodities, if the society had access to them, were easily able to out compete the rest, and to establish themselves on the market as the only moneys. These were gold and silver." Rothbard, *supra*, at 16. It is not difficult to understand why. These metals are relatively scarce, have high intrinsic value per unit of weight, are easily recognized, are very durable (some coins with small amounts of alloys have lasted thousands of years), and lose little or no proportionate value even when divided into increasingly smaller portions. Only economies that have had fiat (or non-commodity-backed) money imposed upon them by force will tend to choose non-commodity mediums of exchange. The relative ease of counterfeiting paper money further contributes to this fact.

It is also true that separate economies will tend toward the same commodity money. Hoppe, *supra*, at 56-57. Although economies that do not engage in trade may initially emerge with different mediums of exchange, as soon as individuals begin interacting with one another, a common medium of exchange will emerge for the same

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[13] Hoppe, *supra*, at 55.

aforementioned reasons that a common medium of exchange emerges initially within a single economy. *Id.*

Whatever commodity is chosen as money has one characteristic that distinguishes it from every other commodity. That is, more is not better. Rothbard, *supra*, at 19-20. Where, *ceteris paribus*, more carrots are better than fewer, more "money" is not. "Once a commodity is in sufficient supply to be adopted as a money, no further increase in the supply of money is needed . . . [o]nce a money is established, an increase it its supply confers no social benefit." *Id.* In fact, increases in the money supply dilute money's unique value as a tool of indirect exchange and as a store of value.

B. Monetary Inflation And Counterfeiting

Long ago, the British classical economists, David Hume and David Ricardo, contemplated the proper quantity of money. Rothbard, *supra*, at 18-23. They engaged in thought experiments to include, "what are the effects of a doubling of a nation's money supply, supposing for example, that when awakening in the morning that the amount of money in everyone's wallet or handbag had been doubled." *Id.* They correctly assumed that, with no coincident increase in the available supply of goods or services, as people rushed out to spend their newfound riches, the only impact would be an approximate doubling of all prices; the purchasing power of each unit of money would be cut in half with no real social benefit conferred. The British classicists, and even many Monetarists of the Chicago School neglected, however, to analyze fully the destructive redistributive effect. *Id.* That is, it matters significantly who first receives and spends the newly introduced money. The early spenders of the newly injected money have the

distinct advantage of availing themselves of lower prices as they use their newfound purchasing power to acquire goods and services before prices roughly double as prices are bid up under circumstances where twice as much money chases the same number of goods and services. *Id.*

This effect may be easily understood in the context of the common counterfeiter. Irrespective of whether counterfeiting takes place in the context of making coins that imitate gold or silver or printing money that imitates government-issued paper money, the process of counterfeiting is one in which the counterfeiter always gets the new money first and spends it before prices are increased by new money's introduction into the monetary system. Hoppe, *supra*, at 59. In short, early receivers of the new money gain at the expense of the late receivers of the new money or those who have no access to new income such as retirees living on savings, on a fixed or some nominal income retirement. *Id.* Thus, it is from the elderly and others of those who rely on savings that the counterfeiter robs to the greatest degree; for they never benefit from the new infusion of money but rather see the value of their savings diminished as prices rise as a result of the new money "inflation." For these reasons, counterfeiters should be understood to be little other than thieves who covertly steal from all those who hold money as a store of value, and especially the later receivers (or non-receivers) of newly infused money.

It is important to note that these same negative economic effects are inflicted upon an economy, irrespective of whether the counterfeiter operates illegally or with the sanction of law. Although coin clipping (whereby the shaving of tiny amounts of metal from circulating coins is re-coined and spent as money) was an early form of counterfeiting

(and largely eliminated by the advent of ridges on coin sides), commodity money such as gold or silver is exponentially harder to counterfeit than paper money – the use of which is nevertheless now compelled by government!

C. Evolution Of Bankers As "Counterfeiters"

It is important to note that unscrupulous banks also can engage in counterfeiting, in a form equally (or more) devastating and more stealthily committed. Once a commodity emerges as money within an economy, the storage and safekeeping of that money as a store of value will become a service demanded by the private holders of money. After all, gold or silver ingots and coins make for a cold, lumpy mattress. Specialization, division of labor, and efficiency will dictate that savings banks emerge to satisfy that need as a solitary, armed guard next to a vault can secure many savers' fortunes rather than each employing one's own guard. Savers of money will thus deposit their money for safekeeping and receive receipts for their holdings upon deposit.

Subsequent and incident to the storage of these monies, rather than trouble the armed guard each and every time a depositor wishes to make a purchase from a trading partner, the deposit receipts may themselves circulate among trading partners assuming that the acceptors of these saving receipts (commonly and historically called "banknotes") are familiar with and trust the issuing bank.

That these "banknotes" circulate as money in lieu of the actual commodities stored is in no way problematic or inflationary, nor does it constitute counterfeiting. This is because the amount of "money" in circulation has not been altered insofar as the banknotes in circulation are exactly

equal to the amount of commodity money stored in the banks' vaults and, at any time, any holder of the banknotes could theoretically redeem those banknotes for the amount of specie listed thereon with no alteration of the money supply.

The counterfeiting and inflationary danger with this system of banknotes occurs only when an unscrupulous bank issues more banknotes than that bank has commodity money stored. Hoppe, *supra*, at 58-59. There are, of course, market checks on a bank doing so. Should a bank issue more notes than that bank has commodity money stored, the bank would become insolvent if, at some point, holders of that bank's notes attempted to redeem those notes for the actual commodity. *Id.* at 59-60. To the extent that all members of a trading community use one bank, it is far less likely that the cheating bank will get caught as the community's banknotes can circulate endlessly without ever being redeemed by some other bank. *Id.*

Thus, competition in banking (rather than one central bank) should be strongly encouraged. *Id.* To the extent that one trading partner receives banknotes of Bank A and presents them to Bank B for deposit, Bank B will, of course, present the banknotes from Bank A for redemption such that Bank B can then assess service charges on its customer. Hence, multiple banks within a community or economy tend to make banks more honest.

For those banks that engage in fraudulent issue of banknotes, a "bank run" spells their doom. *Id.* For those banks that issue only fully-redeemable notes, a bank run poses no threat but rather solidifies their place in the market by exposing any fellow banks that might be fraudfeasors. In fact, "honest" banks would be quick to point out when their fraudulent competitors engage in the "over-issuance" of banknotes. For this reason, only a cartel that

has all banks engaging in "over-issuance" of banknotes in roughly the same proportion than they have actual commodities or commodity money on deposit allows any one bank to engage successfully over time in this fraudulent activity.

The issuance of banknotes not backed by commodity money has the same effect as that of counterfeiting as typically envisioned – by way of the unsavory fiend with a printing press in his dimly lit basement. To the extent banknotes circulate as money and more banknotes are issued than exists actual "money" in the vaults, the same vile effects inure to an economy as when some ne'er-do-well begins printing and passing fifty-dollar bills.

Of course, if the criminal justice system were to assume its proper role of cracking down on fraud, criminal penalties could augment the market checks on banknote inflation. More specifically, were the criminal law to treat deposits as bailment contracts rather than debtor/creditor contracts, the banknote expansion variation of counterfeiting would be criminal like that of its analogous counterparts. Unfortunately, early common law decisions in Britain and the banking lobby set the trend otherwise here in the United States – this, despite the seemingly contradictory rule of treating deposits of other fungible goods as bailment contracts (*e.g.*, grain elevators). Rothbard, *supra*, at 43. English economist W. Stanley Jevons warned against this type of "general deposit warrant," writing that "it becomes possible to create a fictitious supply of a commodity, that is, to make people believe that a supply exists which does not exist . . . on the other hand, with 'specific deposit warrants', it is not possible to issue such tickets 'in excess of goods actually deposited,' unless by

distinct fraud."[14] At the behest of the bankers, however, and to the great detriment of the citizenry, early legal cases designated bankers as creditors rather than following the more appropriate law of bailment for such "businesses."[15] Although "special deposits" (such as money placed in safety deposit boxes) are bailments, almost all bank deposits are treated as something other than bailments, in part because of the blurring of the line between investment banking (in which customers deposit money for specific time periods with the express authority for banks to invest) and savings and demand deposit banking.

D. Banknote Inflation And The So-Called Business Cycle

From time to time, the fraudulent issuer of the banknotes may vary the "level" of fraud being committed depending upon the issuer's perception of the likelihood of his being identified as insolvent or unable to redeem fully that bank's issued notes. This expansion and contraction

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[14] W. Stanley Jevons, *Money and the Mechanism of Exchange* 206-212 (15th ed.) (Kegan Paul 1905) (1875).

[15] "The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal; but he is, of course, answerable for the amount, because he has contracted." *Foley v. Hill and Others*, 2 H.L.C. 36-37 (1848). *See also Hossain v. Rauscher Pierce Refsnes, Inc.*, 46 F.Supp.2d 1164, 1171 (D. Kan. 1999) (quoting *Michie on Banks and Banking*, at 1297) (internal quotation omitted) ("Where a deposit is made generally the relation between the bank and depositor is that of debtor and creditor; but where the deposit is made specially, the relation between the bank and the depositor is that of bailor and bailee."); Rothbard, *supra*, at 43-44.

of the banknote supply by bankers presents its own set of dangers for the economy. To the extent that bankers as a group share similar perceptions that a bank run is afoot and thus reduce the amount of fraudulent banknotes issued, this danger is worsened. It was the recognition of these dangers of bank credit expansion and contraction (the business cycle) for which Friedrich A. Hayek was awarded the Nobel Prize in Economics in 1974.[16]

In short, under market conditions, the amount of money on deposit in savings banks at any given time is a reflection of the cumulative willingness of money-owners to forestall immediate consumption. The level of these deposits and the corresponding market interest rate serves as an indicator as to whether businessmen should be engaging in production of immediately demanded consumer goods or capital goods, which would instead be employed to produce more consumer goods in the future.[17]

Again, it should be noted that, because of the treatment of bankers as creditors rather than as bailees, the line between deposit banks and savings (or investment banks) has become completely blurred and virtually nonexistent. Absent the legal system errantly having allowed holders of demand deposits to loan out money as if they were investment banks (that is, banks engaged in the process of finding investment projects for those who have savings they are willing to lend and risk for some period of time, charging a differential between the interest paid the depositor and the interest charged the borrower), the interest rate charged for money lent is a market indicator

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[16] http://nobelprize.org/economics/laureates/1974/press.html

[17] *See generally* Ludwig von Mises, *Human Action* 538-586 (3rd rev. ed.) (Yale University Press 1969).

of society's willingness to forestall present consumption in exchange for greater consumption in the future. Mises, *supra*, at 548-565.

However, to the extent banknotes are created without commodity backing resulting in artificially low interest rates signaling borrowers to engage in long-term capital projects, these projects are soon revealed as out of touch with consumers' genuine demand for current versus future consumption. *Id.* When banks reduce the amount of expansion in effect in an effort to satisfy this money demand, redemption of demand deposits, and insolvency, the distortion resulting from the previous, artificially-low interest rates becomes apparent and recession occurs resulting in abandoned long-term projects and foreclosures that were out of touch with those actual short-run and long-run demand functions. *Id.* This, because bankers were engaged in creating money out of thin air and loaning it out at interest rates artificially lower than the market rates of interest.[18]

E. Fractional Reserve Banking And The Necessity Of Its Cartelization Through A Central Bank

In part due to the courts' treatment of the depositor/banker relationship as one of debtor/creditor rather than bailor/bailee, the issuance of banknotes in amounts greater than reserves held in bank vaults has come to be known as fractional reserve banking (rather than its more apt label of fraud or counterfeiting). "The entire system of fractional reserve banking, therefore, is built on deceit, a

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[18] *See generally* Jesús Huerta de Soto, *Money, Bank Credit, and Economic Cycles*, chapters 5-6 (Mises Institute 2006).

deceit connived at by the legal system." Rothbard, *supra*, at 43.

Central banks "always had two major roles: (1) to help finance the government's deficit, and (2) to cartelize the private commercial banks in the country, so as to help remove the two great market limits on their expansion of credit, on their propensity to counterfeit: a possible loss of confidence leading to bank runs; and the loss of reserves should any one bank expand its own credit." *Id.* at 58.

As mentioned above, because of the threat of bank runs, exposed insolvencies, and the lack of criminal penalties for that which would be criminal (*i.e.*, counterfeiting) if done by a non-banking institution, only a cartelized system will allow for the continual and regular issuance of banknotes above the level at which there is no true redemption.

Although the Panic of 1907 provided a convenient springboard to launching a public relations campaign for another central bank in the United States, the real problem from the bankers' standpoint was that the money supply was not "elastic" enough – in other words, it could not be increased fast enough to suit bank interests. Although the money supply had been sufficiently elastic during the massive credit expansion of the late 1800s:

> [T]he problem came when, late in the inflationary booms, the banking system ran into trouble, and people started calling on the banks to redeem their notes and deposits in specie. At that point, since all the banks were insolvent, they, led by the Wall Street Banks, were forced to contract their loans rapidly in order to stay in business, thereby causing a financial crisis and a system-wide contraction of the supply of money and credit. The banks were not interested in the contention that

> this sudden bust was a payback for, a wiping out of the excesses of, the inflationary boom that they had generated. They wanted to be able to keep expanding credit during recession as well as booms. Hence their call for a remedy to monetary "inelasticity" during recessions. And the remedy, of course, was the grand old nostrum that nationalists and bankers had been pushing for since the beginning of the Republic: A central Bank.

Id. at 80.

Much as the railroads were able to cartelize their operations through the Interstate Commerce Commission in 1887,[19] on November 22, 1910, Senator Nelson W. Aldrich (R-R.I.), head of the Senate Finance Committee and father-in-law of John D. Rockefeller, Jr., along with a handful of bankers, boarded a private rail car under assumed names bound for a "duck hunting" expedition in Jekyll Island, Georgia. The "duck hunters" worked for a solid week at the plush resort and hammered out the bill creating the Federal Reserve System. In addition to Aldrich, attendees included "Henry P. Davison, [J.P.] Morgan Partner, Paul Warburg, Kuhn Loeb partner; Frank A. Vanderlip, vice-president of Rockefeller's National City Bank of New York; Charles D. Norton, president of Morgan's First National Bank of New York; and Professor A. Piatt Andrew, head of the N[ational] M[onetary] C[omission] research staff, who had recently been made an Assistant Secretary of the Treasury under [President] Taft, and who was a technician with a foot in both the Rockefeller and Morgan Camps." *Id.* at 116.

On December 22, 1913, the bill created at Jekyll Island by the banking industry itself and Senator Aldrich

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[19] *See* Gabriel Kolko, *Railroads and Regulation 1877-1916* (Princeton University Press 1965).

became law with the passage of the Federal Reserve Act. The Fed was given a monopoly of the issue of all banknotes. All national banks were "forced" to become members of the Federal Reserve System (something they had long sought), which meant that national bank reserves had to be kept in the form of demand deposits, or checking accounts at the Fed. The Act placed the Fed in the position of lender of last resort with the power of the Treasury strongly behind it; as such, it could inflate even during recessions in order to bail out banks. *Id.* at 119.

As it turned out, the creation of the Federal Reserve coincided with the outbreak of World War I in Europe and allowed the United States to finance its entry into the war as well as issue massive loans to its allies. During those war years, the Fed roughly doubled the money supply of the United States, and prices doubled as a consequence.

As Dr. Rothbard stated:

> [t]he Federal Reserve System is precisely the cozy government-big bank partnership, the government-enforced banking cartel, that big bankers had long envisioned. Many critics of the Fed like to harp on the fact that the private bankers legally own the Federal Reserve System, but this is an unimportant legalistic fact; Fed (and therefore possible bank) profits from its operations are taxed away by the Treasury. The benefits to the bankers from the Fed come not from its legal profits but from the very essence of its operations: its task of coordination and backing for bank credit inflation. *These* benefits dwarf any possible direct profits from the Fed's banking operations into insignificance.

Id. at 121.

CONCLUSION

Passage of the Monetary Control Act of 1980, Pub. L. No. 96-221, tit. 1, 94 Stat. 132 (the "MCA"), imposed reserve requirements on all banks including nonmember banks. As such, all banks are now compelled by law to be Members of the Federal Reserve Bank and deposit reserves with the Federal Reserve. Insofar, as described above, the Federal Reserve Bank was created at the behest of large banking interests, is a legalized counterfeiter, may be said to be a major contributor to the so-called business cycle of booms and busts, and destroys the savings of persons on limited and fixed incomes, they should be granted little or no deference by this Court in granting *certiorari* to Texas State Bank.

Given that the Federal Reserve allows an elite class with a monopoly privilege to create money and profit from interest "earned" thereon, this Court should grant Texas State Bank *certiorari* to return the interest income generated on Texas State Bank's compelled deposits to its just and rightful owner, Texas State Bank, and minimize further abuses by the Federal Reserve Bank.

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In The
Supreme Court of the United States

TEXAS STATE BANK
(successor by merger to Community Bank & Trust),

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Comes now Texas State Bank, Petitioner, and herein respectfully moves this Court for an order (1) vacating its denial of the Petition for Writ of Certiorari, entered on June 19, 2006, and (2) granting the Petition for Writ of Certiorari. As grounds for this Petition for Rehearing of the above-entitled cause, and, in support thereof, Petitioner respectfully states the following:

GROUNDS FOR REHEARING

A rehearing of the decision in this matter is in the interest of justice because, in addition to the reasons set forth in Petitioner's Petition for Writ of Certiorari, the opinion of the court of appeals below creates an inconsistency between the circuit courts of appeal concerning a substantial constitutional question and is contrary to precedent established by this Court.

On June 19, 2006, this Court denied Petitioner's Petition for Writ of Certiorari. This Petition for Rehearing is timely pursuant to Sup. Ct. R. 44.2.

In its Petition for Writ of Certiorari, Petitioner highlighted for this Court the manner in which the decision of the Court of Appeals for the Federal Circuit below deviated from the jurisprudence set forth by this Court in comparable Takings cases, to wit: *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); and *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003).

However, additional grounds not set forth in Petitioner's Petition for Writ of Certiorari exist that warrant review of the decision below. The opinion of the court of appeals below, if allowed to stand, articulates a previously non-existent defense to Takings claims, namely that the property taken consisted of earnings from the investment of commingled funds and did not result from a deposit into a separate interest-bearing account. *Texas State Bank v. United States*, 423 F.3d 1370, 1379-1380 (Fed. Cir. 2005)

The Ninth Circuit Court of Appeals, having twice commented on the significance of interest earned on commingled funds, has recognized this Court's holding in *Brown* preserves the existence of a cognizable property interest in the earnings from the investment of such funds. *McIntyre v. Bayer*, 339 F.3d 1097, 1101-02 (9th Cir. 2003); *Schneider v. Cal. Dep't of Corrections*, 335 F.3d 716, 720-21 (9th Cir. 2003).

The court of appeals below has conclusively resolved the merits of Petitioner's claim in direct opposition to the Court of Appeals for the Ninth Circuit. In doing so, the Federal Circuit deemed determinative the nature of the investment by which earnings are generated. However, on this point the Federal Circuit, without comment, strayed from this Court's analysis in *Henkels v. Sutherland*, 271 U.S. 298 (1926). Contrary to the view of the court of appeals below, in *Henkels*, this Court stated:

> No distinction in this respect is made between the property and its proceeds.
>
> . . . .
>
> The government cannot be sued without its consent, and accordingly it cannot be sued for interest unless it consents to be liable therefore.

> But the claim here is not for interest to be paid by the United States in the sense of the rule. It is for income, derived from an investment of Henkels' money in obligations of the United States, which income has been actually received by the Treasury and is in its possession. . . .
>
> . . . Whether the government shall pay interest upon its obligations depends upon congressional assent; but it cannot confiscate the actual increment of property belonging to a citizen or the increment of the proceeds into which such property has been converted, any more than it can confiscate the property or its proceeds, without coming into conflict with the Constitution.
>
> . . . .
>
> . . . We cannot bring ourselves to agree that a direction to invest such money in securities of the United States, rather than in other securities, may be utilized to enable the government to enrich itself at the expense of its citizens, by appropriating income actually earned and received, which morally and equitably belongs to them as plainly as though they themselves had made the investment.

Id. at 301-02.

In rejecting the assertion that Henkels' funds were not separate from those of other claimants, this Court directed:

> [A]n account must be taken to ascertain the average rate of interest received by the Treasury upon all the proceeds invested and thereupon, after deducting proper charges and expenses and taking into consideration the average amount of such proceeds that remained uninvested in the

> Treasury, a proportionate allocation made in respect of the proceeds belonging to Henkels for the period of their investment.

Id. at 302.

Accordingly, until the opinion of the court of appeals below is explained, abrogated, or reversed, it will unnecessarily mar the jurisprudential landscape that has been meticulously crafted by this Court through its consistent renderings in *Webb's*, *Phillips*, and *Brown*. Due to the conflict created between the circuits given the Ninth Circuit's decisions set forth above, in all likelihood, the issue raised by the Petition will eventually be determined by this Court. Given that the questions raised by this appeal merely require the further application of this Court's holding from *Henkels* in conjunction with a recognition that the facts before this Court are equivalent to the facts in *Webb's*, *Phillips*, and *Brown*, there is no reason why justice is better served to resolve this discrepancy on some future occasion after unknown, but undoubtedly extensive, judicial resources have been wasted by the litigation that will be fueled by the decision of the court of appeals below.

CONCLUSION

For the reasons stated herein, as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, and that, upon further consideration, grant also the Petition for Writ of Certiorari.

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CERTIFICATE OF COUNSEL

I, Blake H. Bailey, counsel for Petitioner Texas State Bank, certify that this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 44 of the Rules of this Court.

BLAKE H. BAILEY